

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1428

To be argued by
ELLIOT G. SAGOR

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

DAVID KAPLAN,

Defendant-Appellant.

*On Appeal From the United States District Court For the
Eastern District of New York.*

**REPLY BRIEF FOR
DEFENDANT-APPELLANT**

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REPLY BRIEF FOR DEFENDANT-APPELLANT

ARGUMENT

I

Judge Costantino did not and could not exercise meaningful discretion in sentencing David Kaplan for several reasons. The Government's response to Kaplan's claims of sentencing error either relies on: (a) invective (viz., defendant's claims are "specious" and "meritless"; (b) speculation as to what Judge Costantino must have meant; (c) and citation to unassailable propositions of law in no wise questioned by Kaplan (e.g., there is no requirement a court hear from every witness; a judge does

not have to credit defendant's story; or that it is not improper for a judge to give prominence to the deterrent feature of the sentence).

DEFENDANT'S REHABILITATION

The Government does not contest the facts that Probation never visited Mr. Kaplan at his job with Diet-Expo or at the Yoga Center, made a phone call to anyone there or spent more than an hour or so with Kaplan at the probation office, despite defendant's written request a month before sentencing requesting such checking "so that the court may be directly advised by Probation of its observation and conclusions in these respects". See App. Br. 15; A45, 50-51a.* The fact that the probation report made a laconic reference to Mr. Kaplan's work for six months with Diet-Expo (see A61a) and involvement with the Yoga Center and cited to employer letters obtained by defense counsel does not make the information the sentencing court had before it of adequate quality. Defense counsel protested those omissions at the sentencing, but the court noted that there was "no viable occupation by the defendant" for the years he pled to and the court's only concern was not "whether the defendant can do something right after he's caught..." A56-57a; App. Br. 16.

The Government noted, as did the court (A61a lines 10-12; "a stream") that the court was "deluged with letters detailing Kaplan's alleged rehabilitation."** Gov. Br. 12. But letters

* "App. Br." followed by a number refers to Appellant's Brief.
"Gov. Br." followed by a number refers to Government's Brief.

** Both are derogatory terms presumably used to denigrate the worth of the proof of rehabilitation. We ask the Appellate Court to review the letters and determine independently whether they were

by defense counsel are hardly as convincing or a substitute for the first hand reporting of the probation officer who is supposed to be a "professional neutral." United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973).

The Government also claims that "the adequacy or sufficiency of a probation report is not the subject to review." Gov. Br. 16, n. 12. We disagree. We contend that a material omission in a report or in the inactivity of a probation officer may be as unfair to the defendant as misinformation in a report. Defendant was entitled to have the proffered evidence of his rehabilitation, his work of six months and his Yoga involvement -- whether the probation officer was ultimately impressed with it or not -- really examined and evaluated first hand by the professional neutral probation officer. If sentencing judges should be as concerned with getting "reliable", "quality", and "best available information", United States v. Fatico, ___ F. Supp. ___ (E.D.N.Y. 1977) (Weinstein, J.), 76 Cr. 81, pp.7-13, regarding aggravating factors, as with mitigating factors, see Rule 32(a), F.R. Crim. P., it follows that "in some circumstances the probation office...should be requested to provide substantiation of challenged information, submitted to the judge," even if it relates, as here, to mitigation. United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973).

(continuation of footnote)

not, rather, exceptionally informative and supportive as to Kaplan's strong rehabilitation achievements.

Pretrial Services Officer Issac Campbell

In response to Judge Costantino's refusal to hear from Pretrial Service Officer Isaac Campbell, the Government argues that "there is no requirement that the court hear from every witness who may have something favorable to say about the defendant." Gov. Br. 12. But Isaac Campbell was no ordinary witness! He is a professional neutral and as such the man who could have provided the sentencing court with the most competent and persuasive evidence of David Kaplan's rehabilitation. See App. Br. 16-21. Defense counsel had conversations with Mr. Campbell prior to sentencing. He obviously advised us that he believed in the genuineness of Kaplan's rehabilitation, since in our July 21, 1977 sentencing letter we advised the court that (A25a):

We believe that the report of the Pre-Trial Services (Mr. Campbell), which has supervised David continuously since his release on bail in mid-February, will fully support David's growth and the credible track record that he has established over these five months.

Defense counsel spoke to Campbell immediately prior to sentence. We learned that he would say very favorable things if the court asked him to speak about defendant, as he had done previously at a sentencing involving another defendant. At the sentencing defense counsel pressed Judge Costantino to hear from Mr. Campbell, but the court refused. The urgency of our request was underscored by the favorable things - - in contrast to the probation report - - we believe Mr. Campbell would have said on behalf of David Kaplan.

• Mr. Campbell was not a cumulative witness. However, the Government suggests that Mr. Campbell might not say "anything more favorable than that David Kaplan abided by the conditions imposed by the agency," and asked for the basis of

our belief as to what Mr. Campbell would have said. We set forth the basis of our belief above. Gov. Br. 12 n. 10. Should this court have any doubt that defendant was erroneously deprived of his right to present material mitigation information from Mr. Campbell, or that he had such information to give, we respectfully request that the court direct its clerk's office to correspond with the United States Pretrial Services Agency, United States Courts, Eastern District of New York, 189 Montague Street, Brooklyn to solicit directly from Mr. Campbell what he would have told Judge Costantino on Kaplan's behalf at sentencing. Mr. Campbell has advised us that he would be glad to respond directly to this court if requested.

We stress that it is not the function of this appeal to reargue the validity or extent of Kaplan's rehabilitation to this court, but rather to establish that Judge Costantino refused to hear competent facts which may well have thus affected his ultimate sentence, whether by reduction or causing him to treat Kaplan, who is 25 years old, as a Young Adult Offender, as was requested.

The Government claims that "there can be no question that the issue of Kaplan's alleged rehabilitation was fully before the sentencing judge" Gov. Br. 11 (emphasis added). Whether the issue of rehabilitation was before Judge Costantino is begging the question. The pertinent question was whether the court was sufficiently advised by probation and Mr. Campbell of the facts of defendant's alleged rehabilitation so it could properly be considered. The answer to that question has to be "no." Defense counsel's comments are no real substitute for considered evaluations from professional neutrals.

This Court said in United States v. Malcolm, 432 F.2d 809, 819 (2d Cir. 1970):

The result of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and precluded here should therefore have been received and considered. Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris v. United States, 382 U.S. 162, 166 (1965).

The judge, therefore is required to listen and give serious consideration to any information material to mitigation of punishment. We cannot say that if the judge had acted on the basis of complete and accurate information, verified...[by Pretrial Services and Probation] it would have had no mitigating impact on the sentence. This is so although the judge, in his discretion, is not required to lighten the penalty even if there are mitigating circumstances. But no man can make valid judgments without knowledge of the facts. It is thus of no moment that the judge summarily declared that he did 'not care if he helps anybody. It does not matter to me.'

FIXED AND MECHANICAL APPROACH

Not only did defendant's sentence suffer from informational flaws regarding his rehabilitation, but it suffered from "a fixed and mechanical approach" in evaluating the rehabilitation of any drug dealer, regardless of the drug involved, or the circumstances. App. Br. 21-24.

The Government responds that Judge Costantino must have "considered" defendant's rehabilitation in his sentence "since he did not impose the maximum sentence". Gov. Br. 16. But a court's

sentence can still be "fixed and mechanical" and be based on erroneous considerations even though it is less than the maximum punishment.

We respectfully submit that any fair reading of the transcript reveals the judge's antagonism to any consideration that if a drug dealer had rehabilitated himself, it should or could be given any weight. App. Br. 23.

Start From the Maximum

In addition, Judge Costantino stated that it is his belief that Congress intends for judges to punish for drug violations and that the court should start with "the punitive sentence of the Congress" and that the punitive sentence is equivalent to the "maximum". Only, after starting with the "punitive sentence" or presumably the "maximum" would Judge Costantino "then take into consideration the background, the probabilities, potential and also the extent and involvement in the crime." App. Br. 23-24, (A85-86a). We believe that it was error for the court to believe that Congress intended that the court consider the maximum first and work down - - if warranted - - from there. While the Government states that "Congress intended that the distribution of drugs be dealt with severely" (Gov. Br. 14) such legislative intent is altogether different from a fixed and mechanical policy, and one erroneously premised at that, of starting with a "punitive" and "maximum sentence" and "then take into consideration the background..." and other sentencing factors. See Williams v. New York, 237 U.S. 247-49 (1949).

Nothing in United States v. Miller, ___ F.2d ___, Docket

No. 77-1302, slip op. 524 (2d Cir. November 25, 1977) suggests that the sentencing judge should start with a "punitive" maximum punishment as his reference point. The latter approach would be wrong even if Judge Costantino arguably thought imprisonment was not mandatory for a marijuana drug dealer . We think that on this record the court thought it was mandatory, but in any event, the fact that Judge Costantino never said "I am required to give a jail sentence in every drug case regardless" - - a statement anyone could readily regard as impermissible - - does not mean that his sentencing philosophy in this case can be approved. See cases cited, App. Br. 21.

ADDITIONAL ERRORS INVOLVING
BOTH MITIGATING AND ALLEGEDLY
NEGATIVE FACTORS

Confusion Over Double Jeopardy

The Court refused to consider for sentencing purposes the six brutally punitive months that the defendant spent incarcerated in Mexico for the same crimes he admitted to in his plea of guilty, because of a misunderstanding of the application of the double jeopardy clause. See App. Br. 25-30, A78a. The Government acknowledges that the court's reference to double jeopardy when it disagreed with defense counsel was not appropriate, but suggests that the import of that remark was that "Kaplan's case was not a double jeopardy situation". Gov. Br. 17. We believe that the Government's efforts to make sense out of the court's reference to double jeopardy as opposed to admitting the court was in error are unpersuasive.

The Government further responds that the court's preceding statement to its mistaken reference to double jeopardy, "for what he did in Mexico", indicates (Gov. Br. 17):

"if anything, that the court was crediting the Mexican imprisonment towards that aspect of Kaplan's admitted drug activities, but was concerned about his other marijuana dealings (A78a). It is undisputed that Kaplan continued dealing in marijuana subsequent to his release from jail in Mexico (A 19a) (emph. added).

The judge's above quoted statement does not explain the later confusion over the reference to double jeopardy. And the Government's speculation that the court's short statement meant

"if anything, that the court was crediting the Mexican imprisonment" is not at all supported by the record. One, the court constantly referred to defendant's Mexican involvement throughout the sentencing proceedings, e.g., A61a line 22; A66a line 11; A82a. Purportedly Kaplan was being sentenced for that anew. Why mention it if he were not being sentenced for Mexico? Two, if as the Government now suggests, defendant was sentenced by the court for principally his other admitted dealings in marijuana because Mexico was credited, then his three year sentence was worse than harsh. In this connection the Government's citation to A19a of the record is instructive. See App. Br. 26, footnote. That reference was to the fact that sometime in the middle of 1973 defendant admittedly was involved with "several marijuana transactions" with Gene Mueller, the man who shot and almost killed him in 1974. Kaplan would have been 21 years old at the time. The Government's suggestion upon analysis then, that the court was concerned about Kaplan's admitted drug activities not related to Mexico citing to A19a of the record, viz., several marijuana transactions when he was 21 years old,* shows either that the sentence was grossly excessive

* The prosecution alleged in connection with this appeal that Shelly Kaplan was indicted for her possession on April 15, 1976, of three hundred pounds of marijuana found in her parents house. We are further told that at the time of her plea (before Judge Bramwell) she maintained that the marijuana "had been placed there by David Kaplan, " but that "this marijuana was not attributed to David Kaplan in his probation report." Gov. Br. 2. If this marijuana were not attributed to David Kaplan in his probation report, defense counsel does not understand the reasons for the Government's gratuitous reference to it.

or that the Government's argument is not supportable.

Did the court not consider defendant's prior incarceration, because of its confusion over whether the double jeopardy clause would protect him from re-prosecution? At the very least, despite the Government's protests to the contrary, the issue is hardly free from doubt. The inescapable fact is that the court thought that the double jeopardy rule -- if what defense counsel was saying were true -- would protect defendant. The court unfortunately was incorrect, and it cannot be said that defendant's sentence did not reflect this misconception.

Marijuana Lumped with Other Drugs

We wrote that the court showed a disinclination to treat marijuana differently from any other drug and focused instead on whether he was a user as opposed to being in the business. App. Br. 30-31. The Government says that the court's point was that there is an important distinction between one who uses a drug and one who "peddles" it and "that this distinction holds true regardless of the drug -- an observation one can hardly quarrel with (A.82a)." Gov. Br. 18. As far as it goes, we do not quarrel with the Government's observation and the fact that the court was making a point about dealers which wholly disregarded the drug involved. Yet the fact remains when defense counsel emphasized that "marijuana is what we are talking about", the court's response was "I don't care, marijuana, anything that's

illegal..."

Cocaine in the Shoe

The court was ignorant of the facts "vitally material to mitigation" concerning defendant's possession of cocaine in his shoe at the time of arrest. United States v. Malcolm, supra at 819. See App. Br. 32-33. At sentencing the court said (A.61a):

I would like to know whether or not you take any specific issue -- since your client has admitted his guilt and he's now going to be sentenced -- with the factual statement made as to your client's background involving... the cocaine...are any of these statements wrong or improper statements in the probation report? (emphasis added)

I'm asking you whether or not it's factually incorrect, and if it is, I want you to tell me so because you have an absolute right to attack a factually incorrect statement in a probation report, and I'll give you that right.

Immediately thereafter when defense counsel tried to explain about the "miniscule amount of cocaine found on Mr. Kaplan's person," the court interrupted. Judge Costantino said (A62a):

The statute does not talk about proportions. I don't know where anyone gets that idea. There is nothing called a proportionate violation -- a statute is either violated or not violated. The quantity is irrelevant -- unless it's the State of New York Marijuana Law." (emphasis added).

Given the stated concern of the court with cocaine, the several statements in the probation report that defendant was a distributor of "illegal drugs in large quantities"* which drugs specifically included cocaine, the omission of the weight of the cocaine in

* Defendant has denied these claims of crimes not charged in the indictment. See Point II, infra at 18.

the probation report but reference to its purity, and the court's statement that he was accepting for sentencing purposes (albeit as background), "extrinsic alleged crimes" (App. Br. 44), Judge Costantino's statement that the "quantity is irrelevant" is clearly reversible error. The court could well have believed that defendant's possession of an unspecified "small quantity" (the words of the probation report) of "88.5% purity" was evidence that he was dealing in cocaine which was the probation report's ultimate claim. Defense counsel was prevented from telling the judge the specifics about the "miniscule" amount involved, that it should not lead to such an inference of dealing, and that it reflected an amount in the category of personal use by the court's interruption and erroneous conclusion that "the quantity is irrelevant."

The Government's response is a non sequitur. They emphasize that "no statement was made by the Government, either in the probation report or any other time, that Kaplan was believed to be dealing based on the amount of cocaine found in his shoe." They argue that it follows that "Kaplan was not in the position of refuting a challenged allegation. "Gov. Br. 18-19. The fact that the Government does not cause misinformation to exist does not mean it does not exist or that explanation from defendant would not be helpful.

Even if the Government were not responsible for the erroneous impression in the probation report that implies dealing,*

* But see the prosecutor's curious reference in the Government Brief to this cocaine as a "sample" of cocaine. Gov. Br. 4.

or responsible for the court's misstatement that quantity is irrelevant,* the Government never said anything positive to the court or probation that the cocaine in Kaplan's shoe was not the basis for believing he allegedly was dealing in cocaine.

The Government say that the most important point is that the defense counsel was not "prohibited" by Judge Costantino from pressing further once the court said what it did. The Government says defendant made a "strategical decision." Gov. Br. 19. Once the court stated its position that "the quantity is irrelevant" and "a statute is either violated or not violated," pressing further here, as in so many other areas at the sentencing, would appear to have been counter productive and futile. As this court said in Malcolm, 432 F.2d 818:

The sentencing process becomes an empty ritual, and a defendant's right to present 'any information in mitigation of punishment' is meaningless, unless the judge keeps an open mind until after he has heard all the parties calmly and fully without interruption in an orderly manner. Neither that procedure or atmosphere prevailed here.

The Government's frank admission that no statement was made by it that "Kaplan was believed to be dealing in cocaine based on the amount of cocaine found in his shoe" does not go far enough. The Government should have indicated this fact to probation. If the probation report was not clear, the prosecutor should have stated this fact to the court at the sentencing at the very latest. One of the important functions of the prosecutor

*It certainly was not irrelevant to the court whether someone was a dealer or not. See page 11 , supra; A 82a.

at sentence is to insure "that the sentence is not based on mistakes of fact or faulty information". See United States v. Malcolm, supra at 818. This should be so even as to the extent of an aggravating factor such as the cocaine in the shoe.*

* We in no wise imply by these remarks that the prosecutor's silence was in bad faith. We do respectfully submit, however, that an honest mistake of judgment was made by the Government not speaking out about this important item. How quickly and easy it would have been to say: "Judge, the amount in the shoe was 2.26 grams. We don't contend defendant was dealing based on this."

MISINFORMATION ABOUT DEFENDANT'S PRIOR RECORD

Kaplan's youthful offender disposition at age 18 of possession of a forged license was stated in the probation report to be a conditional discharge and a "conviction." The probation officer thought Kaplan lied when he "failed to mention it", and when he "confronted" him with this "conviction", Kaplan admitted it. See App. Br. 36.

Despite defense counsel protests and request that probation check further about the alleged "conviction", probation did nothing. And when defense counsel said he was not previously "convicted" the court told defense counsel "[conditional] Discharge is a conviction", albeit the court said earlier "we are not talking about criminal records. We are talking about the man's attitude..." Under all the circumstances, misinformation about defendant's record requires remand under well recognized precedents. See App. Br. 36-41.

The Government's argument that whether Kaplan was "technically" convicted or not it could not excuse his failure to mention the "arrest" when he was 18 and he could not be "thought better of" is too pat. Gov. Br. 19. Is it clear that Kaplan was asked about the event literally as an "arrest" or perhaps as a "conviction" or an "offense"? Even were he asked about an arrest, under the circumstances of his age and the fact that it was not a conviction, is it not understandable how he could have forgotten or not have understood the event reportable? Had the court been convinced - - as it should have been because it is the truth - - that Kaplan was not previously "convicted", might that not have affected how probation

and the court would have viewed Kaplan's initial failure to recall the event or affect the court's sentence, because literally there stood before him a "first offender." See United States v. Tucker, 404 U.S. 443, 449 n.8 (1972).*

* The Government's citation to United States v. Myers, 375 F.2d 707, 708 (3d Cir. 1967) that the "nothing in the Constitution prevents a sentencing judge from considering a juvenile record for purposes of sentencing" is inappropriate. In Myers the judge could consider a juvenile record qua a juvenile record, not as a conviction. However, Judge Costantino thought, as he stated, that a "conditional discharge" was a "conviction".

Point II

FAILURE TO REQUIRE A HEARING OR
ANY SUBSTANTIATION OF UNCHARGED CRIMES

The sentencing court did not provide for a hearing or otherwise require at least some substantiation of uncorroborated informant information that defendant was the "mastermind" of an extensive conspiracy involving more than marijuana as charged in the indictment. The Government answers, in essence, that defendant never really contested the specific claim in the probation report. The Government contends that defense counsel never specifically labelled as "false" with one exception the uncharged drug offenses in the probation report, that defendant only called such claims "speculative and hearsay" (A.43). The Government is selectively quoting.

The fact is that defense counsel did strongly contest the charges in the probation report. While not using the word "false", we called the informant information in the report "notoriously exaggerated" and "notoriously unreliable". We would understand charges which are called "notoriously exaggerated" as we stated in the exception letter of September 14, 1977 (A43a) to be in effect "false." * That September 14, 1977 claim of error and exception letter delivered by hand was a red flag to the court. Thus, before sentence defendant had requested a hearing as to at least the "accuracy" of the

* On July 29, 1977 defense counsel received a form letter from Chief Probation Officer Jonas P. Horan of the Eastern District, a copy of which letter was sent to the Government. The letter stated in pertinent part "You are directed to serve the court, the Probation Department, and the United States Attorney with any claim of error or exception to the presentence report, on or before two (2) days prior to the date of sentence." (emphasis added). In compliance with the July 29, 1977 letter counsel provided all parties with its claim of error and exception letter dated September 14, 1977, consisting of 7 pages, A.40-46a.

Probation report whose negative informant information we characterized as "notoriously unreliable" and "notoriously exaggerated". Why would we request a hearing if we were not claiming that its negative information was false, i.e., notoriously exaggerated?

At the sentencing, the court said he had received a "statement of objection." (A 54a). We relied on the court's perusal of our error and exception letter and its request for a hearing. Moreover, defense counsel referred specifically to the false allegation that defendant was a supplier of "speed" (allegedly a major supplier of this dangerous drug), and said that "it" [false information] was "typical of the pile-on information that comes from informants to Kaplan's doorstep." (A 64a) The Government appears to contend that it was unclear at the time of sentencing "what other informant information was being contested" (Gov. Br. 22). Other than the charge admitted to, the marijuana transactions in 1973 at A19a, the miniscule amount of cocaine in the shoe, defense counsel had contested and was contesting the grandiose mastermind charges and other informant claims.* We claim that the court was fully on notice that

* The Government notes that defense counsel did not "deny the allegation" in the court's statement that "there is something about him that continued from '74 to '76. Do you take issue with that." The Government implies that in effect defense counsel adopted the court's contention that defendant was involved in an unspecified and uncharged narcotics conspiracy from 1974-76. See A74-74a; Gov. Br. 8, 22. Defense counsel was interrupted by the court; he in no way acquiesced in the court's remarks, and referred the court to the objection letter.

that defendant hotly contested the accuracy of the probation report.

To point up the lack of need for a hearing, the Government says the court placed "little if any weight on the 'extrinsic alleged crimes.'" Gov. Br. 24. But Judge Costantino did not say "I am placing little if any weight on the extrinsic alleged crimes". He said "you can't close your eyes. Justice is not blind....I'm only accepting it as far as background is concerned." (A74-75a).*

There are situations where upon proper protest by defendant a court must be required to provide further corroboration "even though the sentencing judge thought it unnecessary." See United States v. Needles, 472 F 2d. 642, 658 (2d Cir. 1973); United States v. Fatico, supra; App. Br. 47.**

* It would be hard to believe that defendant received three years for just a marijuana offense for which he served previous time and for events when he had not yet turned 22 years old.

**

We do not claim that as a matter of law the sentencing court cannot consider hearsay or crimes not charged. To the extent that the Government suggests that defendant is making such claims, they are "straw man" issues.

CONCLUSION

THE ERRORS IN THE SENTENCING PROCEDURES EITHER ALONE,
BUT ESPECIALLY IN COMBINATION, REQUIRE THAT THE SENTENCE BE
VACATED AND THAT RESENTENCING OCCUR BEFORE A DIFFERENT DISTRICT
JUDGE.

Respectfully submitted,

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